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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

- - - - - X
JACQUELINE BEEBE, 17-CV-6075(W)
Plaintiff
vs.
Rochester, New York
V&J NATIONAL ENTERPRISES, LLC, June 14, 2017
ET AL., 2:04 p.m.
Defendants.
- - - - - X

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARIAN W. PAYSON
UNITED STATES MAGISTRATE JUDGE

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Rochester, New York 14614

(Proceedings recorded by electronic sound recording,
transcript produced by computer).

P R O C E E D I N G S

* * *

THE CLERK: Beebe vs. V&J National Enterprises,
17-CV-6075.

MAGISTRATE JUDGE PAYSON: Okay. Would counsel like
to note their appearances for the record?

MR. FRIE-PEARSON: Good afternoon, Your Honor,
Jeremiah Frei-Pearson for plaintiff and the putative class.

MAGISTRATE JUDGE PAYSON: Okay, Mr. Frei-Pearson.

MS. MCCLUNG: Katherine McClung, Bond Schoeneck &
King for defendants.

MAGISTRATE JUDGE PAYSON: Ms. McClung. Let me note
for the record that I received a letter, as directed, on
June 7th from Ms. McClung indicating on behalf of both parties
that they were unable to reach agreement with respect to an
informal resolution to some or all of the issues raised in
this motion.

I appreciate the efforts to do that and I'm not
going to revisit that territory and I indicated I would simply
proceed to oral argument in the absence of an agreement, so
I'm prepared to proceed.

Mr. Frei-Pearson, this is your motion, so why don't
you go ahead.

MR. FRIE-PEARSON: Certainly. Would Your Honor like
me to approach?

1 **MAGISTRATE JUDGE PAYSON:** Yeah, why don't you use
2 the podium.

3 **MR. FRIE-PEARSON:** So this is a fairly routine
4 conditional certification motion. It's a motion on behalf of
5 V&J delivery drivers, they're Pizza Hut franchisees. They're
6 all paid the exact same way, which is their initial wages are
7 at or near the minimum, and they're reimbursed a set amount
8 per delivery.

9 The fact that they're all reimbursed a set amount
10 per delivery is reinforced by defendants' discovery responses.
11 And plaintiffs allege that that set amount is insufficient to
12 actually cover their driving expenses and, therefore, this
13 pushes their wages far below the minimum.

14 There have been dozens of similar cases throughout
15 the country, including cases against Pizza Hut corporate for
16 the exact same policy. Pizza Hut corporate has changed the
17 unlawful policy. V&J has not.

18 All of those cases have been certified. Defendants
19 pointed out one case where I'm counsel against Papa John's
20 where conditional certification was preliminarily denied.
21 That was denied due to a technicality relating to franchisees
22 and whether or not the franchisees had the same policy as the
23 franchisor where the defendant put in information saying, you
24 know, according to them most of the stores don't reimburse
25 according to this methodology, and the judge on that case

1 instructed us go figure that out and let me know, which we've
2 now done.

3 Here there's no dispute and the evidence which is
4 unrefuted is that they all reimburse in the same way. Cases
5 certifying are legion, including cases against Pizza Hut,
6 Inc..

7 I'm happy to go into more detail on this point.

8 **MAGISTRATE JUDGE PAYSON:** No, I've got a couple of
9 follow-up questions on that. You indicated that everybody,
10 all putative class members here, were reimbursed at or near
11 the minimum wage.

12 What is the basis for that assertion?

13 **MR. FRIE-PEARSON:** So they're paid at or near the
14 minimum wage and then reimbursed a set amount.

15 **MAGISTRATE JUDGE PAYSON:** Okay, paid. But how do
16 you know that, for example, delivery, pizza delivery drivers
17 in stores in Massachusetts are paid at or near the minimum
18 wage?

19 **MR. FRIE-PEARSON:** Sure.

20 **MAGISTRATE JUDGE PAYSON:** That may be, you know, my
21 assumption, but what's that based on?

22 **MR. FRIE-PEARSON:** That's a fair assumption and it's
23 based on a couple things. It's based on declaration from the
24 two declarants who worked at two different stores. It's based
25 on defendants' own lack of representations and

1 representations.

2 The defendant could have come out and said this
3 case shouldn't be certified because we've got 33 stores where
4 we pay the guys \$15 an hour. If that were the case, they
5 would have said it. They didn't say it.

6 And so Your Honor can certainly draw the reasonable
7 inference that it's the same. Beyond that, every declaration
8 they've said is we treat everyone uniformly, everyone signs
9 the arbitration agreement.

10 And further beyond that, I am not aware of any
11 pizza company that pays its drivers significantly above the
12 minimum wage, and I think that's basically been the case in
13 most of these cases. The case that I think is most analogous
14 to this that I'm familiar with is *Bellaspica vs. PJPA*. That
15 was a case against a Papa John's franchisee. We moved for
16 conditional certification with two declarations, both from
17 former drivers.

18 We certainly didn't have declarations for all 50,
19 60 stores, whatever it was. The Court inferred, as I think
20 every other court has inferred, that the guys are making at or
21 near the minimum.

22 And I just think beyond that that's a merits issue.
23 If they can show that there's members of the putative
24 collective who are getting above the minimum wage, they can
25 move to decertify or they can win.

1 But at this stage --

2 **MAGISTRATE JUDGE PAYSON:** Okay, but that wasn't my
3 question. My question was what was the basis for that factual
4 assertion? And I don't necessarily disagree with you that in
5 cases like this, and I don't mean like this in terms of Pizza
6 Hut delivery people, but FLSA cases that I've had a number of
7 motions like this in which there have been factual assertions
8 made by the plaintiff, which have been specifically contested
9 by the defendant with factual assertions in support of the
10 contesting of factual either assertions, allegations or
11 assumptions made by the plaintiff.

12 You know, having said that, I also don't want the
13 record to be unclear that it is the plaintiff's burden. I
14 recognize it is the plaintiff's burden to the extent that
15 Mr. Frei-Pearson's argument was the reason we say that is
16 because defendants have not asserted to the contrary and they
17 certainly are capable of doing that and, therefore, you should
18 infer that my assertion that everybody was paid at or near the
19 minimum is accurate.

20 I suspect that that would probably be legal error
21 if the Court were to say, yes, I'm relying on the fact that
22 the defendant did not put in an assertion to the contrary.

23 So I just want to say that my approach to this case
24 begins, of course, with the proposition that it is the
25 plaintiff's burden, the showing, it is as many courts have

1 recognized a relatively modest showing that's required of
2 similarly situated plaintiffs.

3 But I think in terms of your explanation to me
4 whether I might think, as a practical matter, that good
5 counsel such as we have here on the defendants' side might
6 well have put -- or might even have been expected to have put
7 in such a factual affidavit, I think it would be wrong for me
8 to say I am relying on the absence of such an affidavit to
9 credit your assertion.

10 Okay, go ahead.

11 **MR. FRIE-PEARSON:** Your Honor's point is very
12 well-taken. And to that end we have declarations from two
13 delivery drivers in two different stores.

14 **MAGISTRATE JUDGE PAYSON:** Right.

15 **MR. FRIE-PEARSON:** And as Your Honor noted, it's a
16 very modest and light burden given that we have declarations
17 from delivery drivers in two different stores, and defendants'
18 repeated statements and declarations that drivers are treated
19 the same, right? They all sign arbitration agreements.

20 The reasonable inference and the inference that
21 courts routinely draw in cases like this -- and that's why I
22 talked about PJPA where we had two drivers one store --

23 **MAGISTRATE JUDGE PAYSON:** Mm-hmm.

24 **MR. FRIE-PEARSON:** -- and we certified a 50 to 60
25 store case --

1 **MAGISTRATE JUDGE PAYSON:** Okay.

2 **MR. FRIE-PEARSON:** -- is that they're all the same.

3 **MAGISTRATE JUDGE PAYSON:** I understand the argument.

4 Tell me what you know as a matter of fact with respect to the
5 ownership of all of these stores. I think we're talking about
6 60 what? 68?

7 **MR. FRIE-PEARSON:** 68.

8 **MAGISTRATE JUDGE PAYSON:** 68, as well as the
9 management structure of the stores. Whose employees you would
10 seek to put together as a collective action.

11 **MR. FRIE-PEARSON:** Your Honor's asking about the
12 three defendants?

13 **MAGISTRATE JUDGE PAYSON:** Well, I'm asking about
14 common ownership, common management, what you know about the
15 structure of both of those issues.

16 **MR. FRIE-PEARSON:** Sure. So all 68 stores are owned
17 by the V&J entities. There's V&J National Enterprises, V&J
18 United Enterprises, and V&J holding companies.

19 Defendants just put in a motion to dismiss on
20 Monday --

21 **MAGISTRATE JUDGE PAYSON:** Mm-hmm.

22 **MR. FRIE-PEARSON:** -- arguing that two of the
23 defendants are -- or one of the defendants is not a proper
24 defendant, and we'll respond to that in due course.

25 **MAGISTRATE JUDGE PAYSON:** Right.

1 **MR. FRIE-PEARSON:** That hasn't been raised in
2 connection with this motion. In their answers they admit that
3 one of the entities is the employer and then they dispute the
4 merits issue as to whether or not the other entities are the
5 employers.

6 **MAGISTRATE JUDGE PAYSON:** Mm-hmm.

7 **MR. FRIE-PEARSON:** We alleged it in good faith in
8 our complaint and we will promptly respond to the motion to
9 dismiss.

10 So it's our understanding all of the guys -- let me
11 strike that. Ms. Beebe and Mr. Spano understood they worked
12 for Pizza Hut and beyond that they understood they worked for
13 V&J.

14 **MAGISTRATE JUDGE PAYSON:** Do any of these V&J
15 entities own Pizza Hut stores in other states?

16 **MR. FRIE-PEARSON:** The class is in Massachusetts and
17 New York.

18 **MAGISTRATE JUDGE PAYSON:** Right.

19 **MR. FRIE-PEARSON:** So they own Massachusetts and
20 New York stores.

21 **MAGISTRATE JUDGE PAYSON:** Okay. And you're not
22 aware they own stores in Alabama and California, anywhere
23 else, Pizza Hut stores?

24 **MR. FRIE-PEARSON:** I'm not. And if they were, I
25 would seek to include those stores in the class.

1 **MAGISTRATE JUDGE PAYSON:** Okay. What about
2 management?

3 **MR. FRIE-PEARSON:** In terms of what entity manages
4 it?

5 **MAGISTRATE JUDGE PAYSON:** In terms of -- and you may
6 not know any of this information at this stage. I'm curious
7 about whether these stores are broken up into separate
8 regions, you know, how flat is the management structure, how
9 vertical is the management structure, how many layers are
10 there, are there store managers, regional managers?

11 Do you know any of that information at this stage?

12 **MR. FRIE-PEARSON:** So we've served discovery
13 requests. We've not received any documents. We've received
14 written responses to our discovery requests.

15 I'm happy to speculate for Your Honor based on
16 having litigated against Pizza Hut corporate and Pizza Hut
17 franchisees, but I certainly wouldn't want to represent to
18 Your Honor that I know the answer to those questions right
19 now.

20 **MAGISTRATE JUDGE PAYSON:** All right. Okay, fair
21 enough.

22 **MR. FRIE-PEARSON:** And I would just say once we get
23 full discovery responses, I will know those answers.

24 **MAGISTRATE JUDGE PAYSON:** Okay. All right, so
25 you've talked I think about the first point in your motion.

1 Obviously there's an issue with respect to arbitration
2 agreements and whether employees who signed arbitration
3 agreements should or should not be included in any putative
4 class and receive notice at this stage.

5 **MR. FRIE-PEARSON:** Sure. So the vast majority of
6 cases, and I think in our last filing we had a string cite
7 that was about a page long, hold that this is a merits issue
8 that's inappropriate for consideration.

9 I respectfully think those cases are correct,
10 right? Whether or not this arbitration agreement applies is
11 the quintessential merits issue that need not be reached now.
12 We will send notice to these people.

13 I've proposed staying the case with respect to
14 these people. Or alternatively they can make their motion to
15 decertify it at any time. They can move to compel arbitration
16 of these people, and that's typically how people handle this.
17 I actually think here the issue is before Judge Wolford.

18 But I think were this issue not being briefed
19 before Judge Wolford in a case that was filed close to a year
20 ago, this would be a good case for Your Honor to decide the
21 enforceability of arbitration.

22 I think, first of all, they have waived their right
23 to arbitrate. Mr. Spano filed the case, Mr. Spano offered to
24 stipulate to individual arbitration and dismiss his case.
25 They refused. Mr. Spano then went to triple A arbitration.

1 They refused to pay the triple A for a little over two months.

2 The triple A then closed the case after sending
3 three letters. We then filed to reopen the case. As soon as
4 we filed in court informing the Court about their failure to
5 pay triple A, they paid the triple A.

6 And their latest justification for not paying the
7 triple A is that the triple A charged them the wrong amount.
8 First of all, they could have communicated with the triple A
9 about that. They didn't apparently do that.

10 But beyond that, the triple A did not charge them
11 the wrong amount. Triple A rules explicitly say it's \$1,500.
12 Their interpretation of their own contract is that it's
13 \$1,300. That's wrong. And what that shows is these folks
14 have never arbitrated with anyone.

15 And the standard for determining a motion to compel
16 when you have a waiver issue is summary judgment, and the
17 standard is all inferences go in favor of the non-moving
18 party.

19 So were Your Honor to decide this issue now, we get
20 all the inferences. What's the most reasonable inference,
21 right? Someone that doesn't pay for two and a half months and
22 raises incorrect justifications for not paying is going to
23 fully participate in arbitration, or they're not?

24 You know, in the *Nadeau* case Judge Brescheti said
25 they're not. And I would say should there be any disputed

1 factual issues which you can't resolve with giving us the
2 inference, which is denying it, the proper way to handle it is
3 a summary trial. I mean, that is the standard for resolving
4 these issues.

5 I believe we win these issues right now, but on a
6 quintessential merits issue --

7 **MAGISTRATE JUDGE PAYSON:** Okay, let me ask you this
8 question. Let's say I agree with you. What different
9 discovery issues are going to be raised -- I mean, and what
10 different motions will be raised on the arbitration plaintiffs
11 than the non-arbitration agreement plaintiffs?

12 **MR. FRIE-PEARSON:** Sure. Respectfully, it depends
13 on how much you agree with me. If you agree with me right now
14 on the current record that all motions to compel arbitration
15 should be denied, there's nothing more to be done.

16 **MAGISTRATE JUDGE PAYSON:** Okay. Let's assume I
17 don't agree with you that much.

18 **MR. FRIE-PEARSON:** Fair enough. Let's assume the
19 Supreme Court doesn't ultimately agree with me also and
20 unconscionability isn't persuasive, which I think it is, if
21 that's the case I want -- and we've actually served discovery
22 requests in this case already and they include requests like I
23 want to see all of your documents relating to arbitration, we
24 want to know if you've ever arbitrated correctly, all
25 correspondence you've ever had with the triple A, all

1 documents that are basically going to show is this a one off
2 where they just missed the deadline for Mr. Spano or is this
3 the fact that they've never arbitrated?

4 And then when I have that, I want to take a
5 deposition of Mr. Scott, their deponent, and figure out what
6 happened here and they may want to go elsewhere.

7 Then there's one other really important point.

8 **MAGISTRATE JUDGE PAYSON:** Okay.

9 **MR. FRIE-PEARSON:** I want to see every single
10 arbitration agreement because right now it's a declaration
11 saying 60% of the class --

12 **MAGISTRATE JUDGE PAYSON:** No, I understand.

13 **MR. FRIE-PEARSON:** -- (inaudible) agreements. I get
14 to explore that. But it's not a lot --

15 **MAGISTRATE JUDGE PAYSON:** What is the relevance, and
16 it may be obvious to you, but explain it to me, of whether the
17 V&J defendant entities have or have not arbitrated in the
18 past?

19 **MR. FRIE-PEARSON:** Sure. So it's our belief and
20 we're entitled to the inference based on the way things are,
21 they've never arbitrated.

22 Arbitration is not a thing that they actually give
23 their employees. It's an excuse to get out of court.

24 **MAGISTRATE JUDGE PAYSON:** Okay. If they haven't
25 arbitrated, let's say they've had agreements with employees in

1 the past.

2 **MR. FRIE-PEARSON:** Mm-hmm.

3 **MAGISTRATE JUDGE PAYSON:** And they have chosen not
4 to arbitrate a dispute that's arisen that is apparently
5 subject to the arbitration agreement.

6 What bearing does that have on a different
7 employee's -- enforceability of a different employee's
8 arbitration agreement?

9 **MR. FRIE-PEARSON:** Well, so it goes to the universe,
10 right? If the universe is the only -- first of all, it would
11 be helpful to know did what happened to Mr. Spano happen to
12 other people? Perhaps someone else submitted, you know, tried
13 to go to arbitration.

14 **MAGISTRATE JUDGE PAYSON:** Mm-hmm.

15 **MR. FRIE-PEARSON:** They didn't pay. If that
16 happened four or five times, I would think the relevance would
17 be very clear, right?

18 If Mr. Spano's a one off, counsel would use that to
19 their -- that's very helpful.

20 **MAGISTRATE JUDGE PAYSON:** So the argument would be
21 if there are others that they chose not to arbitrate with at
22 some point, there are enough others that you ought to infer
23 that they never intend to arbitrate? That these are illusory
24 agreements that they don't intend to abide by.

25 **MR. FRIE-PEARSON:** I think one can make that

1 inference right now based on Mr. Spano alone. I think it's a
2 pretty damning record when you get three letters from the
3 triple A.

4 **MAGISTRATE JUDGE PAYSON:** Okay, but that's the
5 relevance of whether they've arbitrated with others?

6 **MR. FRIE-PEARSON:** Sure. And any communications
7 relating to that, right? What are the internal e-mails about
8 this? What did they put down when they created their
9 arbitration policy?

10 And then I really want to get under oath what
11 happened. I mean, the excuses we get are the triple -- the
12 amount triple A asked for wasn't right. That's not true.

13 It was mailed to the wrong address. That's not
14 true. It was mailed to the address of their main company.

15 I mean, they knew about it. They filed it in court
16 because they complained about the way we formatted our
17 arbitration complaint. But yet they weren't paying the triple
18 A.

19 So I'm entitled to get those facts out if we're
20 gonna have a summary trial. Again, I think on this record,
21 respectfully, I would urge both Your Honor and Judge Wolford
22 to just strike it down.

23 But if that's not where Your Honor is now, it's a
24 merits issue. We should get discovery. And they can make
25 their motion and we will oppose it.

1 **MAGISTRATE JUDGE PAYSON:** Okay, thank you.

2 **MR. FRIE-PEARSON:** Thank you very much, Your Honor.

3 Any other --

4 **MAGISTRATE JUDGE PAYSON:** Not at this moment. I may
5 come back to you.

6 Okay, Ms. McClung.

7 **MS. MCCLUNG:** Thank you, Your Honor. As has already
8 been mentioned today, we did file a motion to dismiss on
9 Monday both on -- for a lack of subject matter jurisdiction
10 over all the claims, lack of personal jurisdiction over one of
11 the defendants, and failure to state several claims.

12 We do believe that that motion should be decided
13 before the conditional certification motion, especially
14 inasmuch as it goes to the Court's jurisdiction.

15 **MAGISTRATE JUDGE PAYSON:** Okay. Certainly you could
16 have filed a motion to dismiss at the outset of the case on
17 jurisdictional grounds. You could have cross moved in
18 opposition to this motion.

19 So I appreciate that you may think that the Court
20 should hold off on this decision until the other decision is
21 reached, but the Court does not intend to do that.

22 **MS. MCCLUNG:** Obviously the Court has discretion in
23 this matter.

24 **MAGISTRATE JUDGE PAYSON:** Okay.

25 **MS. MCCLUNG:** As far as this motion goes, the motion

1 for conditional certification, while it is a modest burden,
2 it's been described as a modest burden, it's hardly a
3 non-existent burden. And there is a requirement that a
4 factual showing be made and the Second Circuit in *Meyers* has
5 said that that factual showing cannot be satisfied by
6 unsupported assertions.

7 And I would argue that that's exactly what we have
8 here. We have an affidavit from Beebe saying this is what
9 happened to me, I believe this happened to other delivery
10 drivers at my store; and a similar declaration from Spano who
11 worked at a store just a few miles away.

12 **MAGISTRATE JUDGE PAYSON:** There are a lot of cases
13 in which relief such as is sought here by plaintiff is granted
14 on the basis of one affidavit or two affidavits. So this case
15 is not unique in that respect.

16 **MS. MCCLUNG:** That is true. But a lot of those
17 cases involve affidavits with much more detailed assertions
18 such as I've spoken to my co-workers and they told me X. It's
19 not I believe that there's a common policy.

20 If that's all --

21 **MAGISTRATE JUDGE PAYSON:** Okay. Well, here it
22 strikes me that -- I mean, the facts -- the facts are not
23 complicated. In many cases the facts not complicated, but you
24 know, the affidavit is relatively short. It is, I think, also
25 a reflection of the fact that for purposes of this particular

1 issue today, it's not a particularly complex set of factual
2 allegations that are relevant.

3 The named plaintiff has said, you know, I was paid
4 at or near the minimum wage. My automobile reimbursement
5 expenses were reimbursed at a flat rate of \$1.35 per delivery.

6 **MS. MCCLUNG:** Mm-hmm.

7 **MAGISTRATE JUDGE PAYSON:** You know, I generally made
8 four deliveries in an hour, et cetera, et cetera and, you
9 know, doing the mathematical calculations, the compensation
10 that she received was well under the minimum wage that she
11 was -- the wage that she was required to be paid by a fairly
12 substantial amount.

13 And Mr. Spano has essentially asserted the same
14 thing in a different store owned by, you know, owned by the
15 same franchisee who owned evidently 68 stores in the
16 geographic region of New York and Massachusetts.

17 It seems, frankly -- oh, and you couple that with
18 your admission through the proper discovery request, that
19 pizza delivery drivers for this franchise were reimbursed or
20 paid for their vehicle expenses at a flat rate.

21 **MS. MCCLUNG:** Mm-hmm.

22 **MAGISTRATE JUDGE PAYSON:** And I recognize that
23 you've said that flat rate, you know, may have varied
24 depending on area, geographic area or time, okay?

25 But it seems to me that it is only reasonable to

1 infer that other people who are working at the same stores as
2 the plaintiff and Mr. Spano at the same time that they were
3 working are being reimbursed for their vehicle expenses at the
4 same flat rate.

5 I think it would be unreasonable to assume anything
6 else. So, you know, I thought about the argument that you
7 made that those assertions are couched in terms of I
8 believe --

9 **MS. MCCLUNG:** Mm-hmm.

10 **MAGISTRATE JUDGE PAYSON:** -- that my colleagues
11 received this, but I think even absent that, the Court would
12 be reasonable -- and I think it is the only reasonable
13 inference on the record before me, that people who worked with
14 Mr. Spano and Ms. Beebe were reimbursed at the same rate as
15 they were.

16 I think it would strain credulity to think anything
17 to the contrary.

18 **MS. MCCLUNG:** Mm-hmm. Well, with respect to Mr.
19 Spano, the standard, of course, is to make a showing that
20 there's similarly situated people who could opt-in to the
21 class.

22 And with respect to Mr. Spano, he does have his own
23 case pending before this Court in a related action, so I
24 don't -- you know, defendants questioned --

25 **MAGISTRATE JUDGE PAYSON:** I read that argument and

1 I, you know, the first time I read it I thought this is a
2 silly argument, and then I was never disabused of that -- of
3 that view.

4 It is a sworn affidavit from somebody with
5 knowledge who has said in a different store I was paid exactly
6 in the same manner as Ms. Beebe.

7 **MS. MCCLUNG:** Mm-hmm.

8 **MAGISTRATE JUDGE PAYSON:** And the question before me
9 is: Are there similarly situated plaintiffs who should be
10 permitted the opportunity to opt-in? And Mr. Spano has sworn
11 under oath that he was reimbursed in the same rate at a
12 different store and he believes other people in that store
13 were reimbursed that same -- in that same manner.

14 Whether or not he's properly joined in this action
15 versus his own action, whether at some point there would ever
16 be consolidation of those actions, I think is not relevant to
17 the question of, you know, his affidavit just says I'm here,
18 I'm raising my hand to swear to tell the truth to tell you
19 that this went on at this second store.

20 **MS. MCCLUNG:** Okay. You mentioned the admission and
21 the interrogatory responses with respect to the set rate.

22 **MAGISTRATE JUDGE PAYSON:** Mm-hmm.

23 **MS. MCCLUNG:** You know, it is worth noting that that
24 was a response just on behalf V&J employment. The other
25 defendants were served with separate interrogatory responses

1 and served -- I'm sorry, separate interrogatory requests and
2 served separate responses that were not presented to the Court
3 on the record and did not contain that same statement.

4 **MAGISTRATE JUDGE PAYSON:** Okay. But for purposes of
5 this question, isn't the relevance that one defendant who is
6 the employer has said there was a flat rate that applied to --
7 I mean not necessarily the same flat rate, but a -- all of the
8 pizza delivery drivers were reimbursed for vehicle expenses at
9 a flat rate, that that was company policy -- I mean, that was
10 franchise policy.

11 **MS. MCCLUNG:** Right, with respect to its employees.
12 But it's not the only defendant here, of course. There are
13 three other defendants and they're seeking to get conditional
14 certification --

15 **MAGISTRATE JUDGE PAYSON:** But aren't you admitting
16 that that -- that entity is the employer of these pizza
17 delivery drivers?

18 **MS. MCCLUNG:** That entity employed Mr. Spano and
19 Ms. Beebe, that's correct.

20 **MAGISTRATE JUDGE PAYSON:** All right. Okay, let's see
21 what other questions -- you know, I will acknowledge that I
22 think that you've -- that you've argued vigorously and I, you
23 know, when you go back to your client and you tell your client
24 that you lost on these motions, which you're going to lose on
25 these motions, it's not because you didn't do a thorough and

1 vigorous job arguing everything you could argue.

2 I just think that it's an easy case in my
3 perspective. This is an easy case. I agree with you that a
4 modest showing doesn't mean no showing.

5 **MS. MCCLUNG:** Mm-hmm.

6 **MAGISTRATE JUDGE PAYSON:** And I have had cases where
7 I have said you're not there yet. Go take some discovery, you
8 need to do some discovery. Where there has been a question
9 of, you know, a very large national company with different
10 management structures and it's uncertain as to, frankly,
11 whether payment practices are as a result of a policy, is it a
12 company policy? Is it a regional policy? Who is setting the
13 policy? You've only got one person in one restaurant or one
14 store.

15 So sometimes those arguments have merit, but I just
16 don't think this is one of those cases. The fact that the
17 showing of similarly situated is described consistently as a
18 modest showing at this stage does mean something.

19 And I haven't struggled really at all with the
20 question of whether it's reasonable to infer that people who
21 worked at Mr. Spano's store and people who worked at
22 Ms. Beebe's store are properly, you know, part of a putative
23 class at this juncture.

24 You know, the only question that -- on that
25 particular issue that I have spent a fair amount of time

1 thinking about is whether it is reasonable to go the entire 68
2 stores. And, you know, I probably spent a lot of time
3 thinking about it because I want to make sure that I have
4 given you absolutely as fair consideration as you deserve
5 because you've argued this strenuously.

6 You know, in the end I concluded where I started,
7 which is, yes, and recognizing that of course there are two
8 phases and there is potentially de-certification phase down
9 the road if it turns out that facts develop in a way that I do
10 not believe it is reasonable to infer that they will at this
11 time.

12 And, you know, I start with or the -- the basis on
13 which I reach that conclusion is we're talking about pizza
14 delivery drivers. We have two in two different stores who say
15 I'm paid at or near the minimum wage.

16 There are a lot of cases that deal with pizza
17 delivery drivers. I don't think it is unreasonable or beyond
18 the discretion afforded to a judge to say it's reasonable to
19 think that pizza delivery drivers, whether they're working in
20 Massachusetts or working in New York working for this
21 franchise, this Pizza Hut franchise, are also being paid at or
22 near the minimum wage.

23 Maybe that will prove to be incorrect as to, you
24 know, I would say a small number of employees, but I think it
25 is reasonable given the affidavits that we have, given the

1 work that they do and given the other litigations that have
2 already been filed and litigated involving pizza delivery
3 drivers to infer that you got drivers and that the base rate
4 of pay is at or near the minimum rate.

5 Now, what we know is that one of the entities as
6 employer has admitted that there was a flat rate. It is
7 reasonable in my estimation to infer that pizza delivery
8 drivers were reimbursed a flat rate for their vehicle
9 expenses.

10 I recognize that the record does not yet establish
11 what that flat rate was at every point in time and in every
12 store, you know, in every location. And I credit on this
13 record that -- and I assume that the defendant will be able to
14 show that there is -- that there is or there was some variance
15 between the rate at a particular point in time and perhaps a
16 store in Eastern Massachusetts versus Western New York.

17 The question is whether it is appropriate on this
18 motion to say the conditional certification should await that
19 discovery or not. And the reason that I conclude that it
20 shouldn't is because the plaintiffs have laid out in their --
21 in their motion papers, probably the affidavit as well,
22 frankly, their mathematical calculations of how they arrive at
23 the conclusion that Ms. Beebe and Mr. Spano were not lawfully
24 paid. And according to their calculations, they are far off
25 the rate of that they should have been paid.

1 Again, you know, that depends on some factual
2 assumptions about, you know, how many miles were driven and
3 how many stops they had and so forth. And, you know, I,
4 frankly, plugged in some other numbers and said, okay, let's
5 assume somebody in Eastern Massachusetts is reimbursed, you
6 know, at a higher rate, you know, had fewer or more deliveries
7 and so forth.

8 And it seems to me reasonable to infer, because of
9 the significant variance between what Ms. Beebe and Mr. Spano
10 have said their duties entailed and what they should have been
11 paid compared to what they were paid, that there's still an
12 enormous amount of room there.

13 So even assuming that you're going to find pizza
14 delivery drivers at other stores at other points in time who
15 were reimbursed at a flat rate in excess of what Ms. Beebe and
16 Mr. Spano were, I still think it's reasonable to infer that
17 they likely have a claim for unlawful wages, that they weren't
18 paid the wage that they should have been paid.

19 So that's how I arrive at that. You know, if it
20 were closer in terms of, you know, they're five cents off what
21 they should have been paid, then I might say go do some
22 discovery.

23 But those are the considerations that I'm relying
24 on to say at this juncture it is reasonable to assume that
25 the -- everybody who is working for the same franchise in two

1 states, 68 stores, are being paid in the same manner and that
2 there is a very strong likelihood if Ms. Beebe and Mr. Spano
3 have a claim, that they too have a claim.

4 And so I do find that the plaintiffs have satisfied
5 this showing, albeit modest, that they're required to make at
6 this time, that there may be some factual questions and
7 factual development that puts you in a position later on to
8 come in and say you know what? This store is out or, you
9 know, these 24 people are out.

10 But we're not there yet, and I think in terms of
11 evaluating whether the plaintiffs have satisfied the standard
12 that they're required to satisfy at the first stage, they've
13 done that. Okay?

14 **MS. MCCLUNG:** Okay.

15 **MAGISTRATE JUDGE PAYSON:** Now, why don't you go
16 ahead and tell me anything more you want to tell me with
17 respect to the arbitration agreement.

18 **MS. MCCLUNG:** Okay, thank you, Your Honor. With
19 respect to the arbitration agreement, you know, the first
20 point I would make is Mr. Frei-Pearson talked a lot about the
21 Spano case and the Spano arbitration agreement and whether or
22 not they waived the right to arbitrate as against Spano.

23 And we obviously disagree about the merits of that
24 argument and that's been fully briefed in the Spano case.

25 **MAGISTRATE JUDGE PAYSON:** Right.

1 **MS. MCCLUNG:** But as far as how that impacts this
2 case, even if Mr. Frei-Pearson were to prevail on his
3 arguments in the Spano case, which we don't think he will, it
4 wouldn't mean that there's been a breach or a waiver of
5 separate arbitration contracts with separate employees.

6 If I opened a widget company and I used a standard
7 form contract with all of my customers and I breached that
8 agreement by sending widgets past the delivery date to one of
9 those customers, it wouldn't mean all my other customers can
10 sue me for breach of contract.

11 And I haven't seen any cases that hold -- cited by
12 either of the parties in our extensive briefing on the issue,
13 that hold that if a company breaches an arbitration agreement
14 against employee A it means that they can't arbitrate against
15 any of the other employees.

16 **MAGISTRATE JUDGE PAYSON:** Yeah, that's an
17 interesting argument and I think that is why I asked him, you
18 know, what is the relevance of that and I'm not prepared to
19 offer an opinion as to whether and under what circumstances I
20 would find that information relevant or not.

21 You know, if -- if a defendant had the right to
22 resort to and -- to resort to an arbitration mechanism for
23 resolving disputes and never did so, you know, over the course
24 of many years, you know, is it fair to assume that they -- I
25 don't know, I don't know. That's an interesting question.

1 **MS. MCCLUNG:** Okay. Another issue is the fact that
2 we have two federal statutes at play here. We have the
3 Federal Arbitration Act --

4 **MAGISTRATE JUDGE PAYSON:** Mm-hmm.

5 **MS. MCCLUNG:** -- which creates a strong presumption
6 in favor of arbitration as the Supreme Court has held
7 repeatedly in recent years.

8 And we have the Fair Labor Standards Act, which
9 creates this mechanism for employees to opt-in. And the
10 Second Circuit recently addressed the inner play of those two
11 statutes in *Sutherland vs. Ernst & Young*, which is 726 F.3d
12 290. And in that case they were considering whether
13 arbitration agreements with class waivers were enforceable in
14 the FLSA context and held that there is the strong presumption
15 in favor of arbitration created by the FAA and that can only
16 be overridden by a contrary congressional command, and they
17 considered whether the FLSA has such a contrary congressional
18 command, whether it overrides the FAA.

19 And there, after looking at the very section of the
20 FLSA that permits people to opt-in to the statute and even
21 emphasizing that language, they determined that there was no
22 contrary congressional command in the FAA.

23 And given that ruling by the Second Circuit just
24 several years ago, I think if you consider whether it makes
25 more sense to send the notice, let people opt-in, do extensive

1 discovery with these opt-in plaintiffs and then decide this
2 issue, possibly a year or more later versus not sending the
3 notice upfront, resolving this issue and then if you find that
4 the arbitration agreement's unenforceable sending the notice
5 at that point that this decision mandates the latter because
6 the FAA does trump the FLSA including the opt-in provision.

7 **MAGISTRATE JUDGE PAYSON:** Okay. Here is my view on
8 the arbitration agreement issue. It does seem to me that this
9 particular dispute justifies, you know, a more nuanced
10 response with respect to the specific dispute presented by the
11 papers, which is should employees, pizza delivery drivers who
12 have signed an arbitration agreement receive notice and be
13 given an opportunity to opt-in at this stage, or should they
14 be excluded because they are not similarly situated to the
15 other pizza delivery drivers.

16 I side with the plaintiff. I think it is that
17 there are -- that there are merits questions that are raised
18 by -- as to the enforceability of the agreements here.

19 Certainly there are some, you know, hotly contested
20 factual disputes before Judge Wolford as it pertains to Mr.
21 Spano, which may or may not have resonance and relevance to
22 other employees, I think that remains to be seen.

23 But I can certainly envision that if Judge Wolford
24 were to find -- were to write a decision that favored the
25 plaintiff, perhaps there would be something in that decision

1 that would have some relevance and resonance to other
2 employees' arbitration agreements.

3 The Second Circuit as far as I read their authority
4 says arbitration agreements are enforceable. You know, there
5 was some language that says if we were writing on a clean
6 slate, you know, maybe we would have a different view of
7 things, but we're not. We find them enforceable.

8 So I start with that proposition, that arbitration
9 agreements under controlling authority in the Second Circuit
10 may be enforceable.

11 So -- but we've got an issue pending, a case
12 pending before Judge Wolford in which she is addressing, at
13 least as to one plaintiff, Mr. Spano, the very arbitration
14 agreement that is at issue in this case. And she's going to
15 issue a decision on that that may or may not have relevance to
16 the other pizza delivery drivers.

17 Secondly, the Supreme Court is going to hear this
18 dispute. The Supreme Court conceivably may side with the
19 plaintiff and you may end up with an arbitration agreement
20 that you thought was enforceable that the Supreme Court says
21 is unenforceable.

22 I think it makes sense, unless both of you tell me
23 that you would prefer not to handle it this way, I think that
24 you should proceed with discovery that relates to everybody
25 and all the issues that Mr. Frei-Pearson has identified

1 relating to the arbitration agreements.

2 I would be in favor of setting those to the side
3 for the time being because I think it may be that you end up
4 taking a lot of discovery that is unnecessary depending on,
5 you know, what kind of a decision you get from Judge Wolford,
6 what the Supreme Court does.

7 You know, I'm uncomfortable saying that there
8 should be a hold on that discovery until there is a decision
9 because sometimes those things just take a lot longer than
10 anybody anticipates.

11 But I would say what I would like you to do is work
12 together to come up with a discovery plan that says this is
13 what we're going to do first and, you know, we're going to
14 come back to you at such and such a time, either after we've
15 done this or you can give me a date, and we'll let you know
16 where we are.

17 And then you'll give me your positions at that time
18 as to whether you should at that point go forward with
19 discovery relating to the arbitration agreements or whether it
20 would, in your estimation, still make sense to hold off on
21 that discovery because I don't think it makes sense to do a
22 whole -- I mean, there are a lot of people that are at issue
23 here, to do a whole lot of discovery relating to those
24 agreements if something happens and those people will
25 ultimately end up out of the case.

1 But in terms of the legal standards here and the
2 balancing of the interests which include the fact that with
3 each day that somebody's not given notice and an opportunity
4 to opt-in, they lose a potential claim. And that's a very
5 real interest on the side of the plaintiffs.

6 So my view is I can accommodate the competing
7 interests by allowing the plaintiff to send notice to those
8 individuals, allow them to opt-in, but at the same time to say
9 to both parties, but probably this is more an interest of the
10 defendant, okay, you know, let's not go full bore on that
11 discovery because it may turn out that you don't need to, and
12 I would prefer that you not spend a lot of time in my own
13 discovery that may not be necessary.

14 So that's what I would like you to do is to sit
15 down and see if you can work out a discovery plan, which is
16 more than just saying, you know, fact discovery by X date, but
17 really talk about how you're going to do it.

18 And then, you know, make a proposal to me and if it
19 makes sense to both of you, I'm probably not going to have any
20 problem with it. If there's a dispute, we can talk about
21 that.

22 So that's what I would like to do.

23 **MS. MCCLUNG:** If I could just raise one additional
24 issue with respect to the drivers?

25 **MAGISTRATE JUDGE PAYSON:** Sure.

1 **MS. MCCLUNG:** One concern that the defendants have
2 is if they engage with discovery on all the drivers, that they
3 would -- that would create an argument that they've waived
4 their right to assert the arbitration agreement with respect
5 to those drivers.

6 Defendants' plan had been if any of those drivers
7 opt-in, defendant would immediately move to compel, to
8 preserve its right.

9 **MAGISTRATE JUDGE PAYSON:** Mm-hmm.

10 **MS. MCCLUNG:** So how would you like us to deal with
11 that? Would you still want us to move to compel upfront, but
12 still hold off on the discovery? And if you don't want us to
13 move to compel upfront, will we have any assurances that
14 engaging in that discovery won't create a basis to argue that
15 we've waived?

16 **MAGISTRATE JUDGE PAYSON:** I think that's a fair
17 question and I didn't think about that.

18 **MS. MCCLUNG:** Mm-hmm.

19 **MAGISTRATE JUDGE PAYSON:** So I would say why don't
20 you all talk together about that issue and see if there's
21 something that you can propose that would -- that would
22 accommodate both of your interests. If not, I have to think
23 some more about it.

24 But I understand what you're saying and I do see
25 the legal issues --

1 **MS. MCCLUNG:** Right.

2 **MAGISTRATE JUDGE PAYSON:** -- that are raised there.
3 I mean, certainly, yeah, I think we'll just leave it at that.
4 But that's a fair question.

5 **MS. MCCLUNG:** Okay.

6 **MAGISTRATE JUDGE PAYSON:** Okay. And just on that
7 particular issue, I just want to note four cases. There are
8 cases on both sides of the question that's raised with respect
9 to the arbitration agreements, there are -- there certainly is
10 some authority that supports the defendants' position, but in
11 terms of the authority that I have considered, I find more
12 persuasive at this stage the authority supporting the
13 plaintiff's position.

14 There are quite a number of cases really across the
15 country. I'm simply going to cite four within the
16 Second Circuit and, again, that's not to say that there aren't
17 plenty of cases holding similarly in other districts, but
18 because there are different standards in different circuits, I
19 was looking at the Second Circuit.

20 So those cases that support the Court's ruling with
21 respect to including them at this stage would be *Racey*
22 *vs. Jay-Jay Cabaret*, 2016 WL 3020933, and in that case the
23 Court cited the language from *Romero vs. LaRevis Associates*,
24 courts have consistently held the existence of arbitration
25 agreements is irrelevant to collective action approval because

1 it raises a merits based determination, citing *Lloyd*
2 *vs. JP Morgan Chase*, the precedent in this district holds that
3 the existence of an arbitration agreement is irrelevant at the
4 conditional certification stage. While the Court may
5 ultimately have to evaluate the validity of any purported
6 arbitration agreements, such inquiry will not prevent
7 conditional certification at this stage. And as discussed in
8 greater detail below the Court also will not limit recipients
9 of the notice on this ground.

10 *Garcia vs. Chipotle Mexican Grill*, that is 2016 WL
11 6561302, and quoting from that decision as defendant concedes,
12 quote, courts have consistently held existence of arbitration
13 agreements is irrelevant to collective action approval because
14 it raises a merits based determination, quote, case law holds
15 that issues of fact surrounding arbitration agreements are
16 properly resolved at the second stage of the two step inquiry
17 when the Court will examine whether plaintiff and the opt-in
18 plaintiffs are in fact similarly situated. Because it is
19 inappropriate for the Court to consider the effect of any
20 arbitration agreements at this time, the Court will allow
21 notice to be sent to employees hired after August 2014.

22 *Hernandez vs. Immortal Rise, Incorporated*, 2012 WL
23 4369746, quoting, similarly defendants request that
24 plaintiffs' proposed class exclude employees who signed
25 arbitration agreements with defendants. While the Court may

1 eventually have to determine enforceability of these
2 agreements, quote, the existence of arbitration agreements is
3 irrelevant to class certification because it raises a merits
4 based determination, citing some different authority.
5 Therefore, the class shall not be restricted by any
6 arbitration agreements at this time.

7 And then finally *Romero vs. LaRevise Associates*,
8 968 F.Supp.2d 639. So those are just some examples of
9 authority in the Second Circuit that stands for the
10 proposition that the question of enforceability of arbitration
11 agreements is a merits based question that is more
12 appropriately resolved at the second stage of the proceeding
13 rather than the first stage, and I find those cases to be
14 persuasive.

15 But by the same token, I think we can as a
16 practical matter deal with the fact that those plaintiffs have
17 some different or some additional factual questions and let's
18 put those to the side at least for the time being and then we
19 can revisit that down the road.

20 As far as discovery goes, assuming you can work out
21 the issue that you've identified that you're not going to be
22 subject to an argument that somehow the defendants have waived
23 their rights under the arbitration agreement if they do
24 anything other than immediately, as soon as somebody opts-in
25 seek to enforce -- compel arbitration.

1 **MS. MCCLUNG:** Right.

2 **MAGISTRATE JUDGE PAYSON:** I understand that's your
3 question. Okay?

4 **MS. MCCLUNG:** Mm-hmm.

5 **MAGISTRATE JUDGE PAYSON:** All right. You had some
6 notice issues and we can talk about those -- let's see if I --
7 okay, relevant time period, I think the question was whether
8 it should be limited to Ms. Beebe's dates of employment or
9 extend beyond that, right? That's the dispute?

10 **MS. MCCLUNG:** Right.

11 **MAGISTRATE JUDGE PAYSON:** Okay, and I find that the
12 cases -- the majority of the cases support the plaintiff's
13 position as to that issue.

14 60 to 90 days, 60 days, the plaintiffs cited a case
15 in which I said 90 days. I can't, frankly, remember and I
16 didn't go back to check whether that was something that was
17 contested. The facts of that case are considerably different
18 I think than the facts of this case and there have been other
19 cases in which I have found 60 days to be appropriate, cases
20 after Sherrill.

21 And I think that that is the more common time
22 period and I think 60 is appropriate here.

23 Telephone numbers and e-mail addresses, yes. I
24 don't know if you're arguing over Social Security numbers. I
25 can't remember whether that was this case or a different case.

1 **MS. MCCLUNG:** I believe they didn't request Social
2 Security numbers.

3 **MAGISTRATE JUDGE PAYSON:** Okay, I didn't think that
4 was at issue, but telephone numbers and e-mail addresses
5 should be provided so long as the plaintiff is bearing the
6 cost, if you want to send a follow-up post card, I think
7 that's within my discretion to allow you to do that.

8 And you're not asking that the defendant bear the
9 burden of the cost of the follow-up post card, correct?

10 **MR. FRIE-PEARSON:** That's correct. Thank you, Your
11 Honor.

12 **MAGISTRATE JUDGE PAYSON:** Okay.

13 **MS. MCCLUNG:** Will the plaintiff provide the
14 contents of the post card for review prior to --

15 **MAGISTRATE JUDGE PAYSON:** Yes, I think that should
16 be provided and agreed on, yeah.

17 And filing of consent forms within five days,
18 that's not something that I have commonly seen. So I'm
19 disinclined to require that. I mean, if there comes a point
20 in time in which there is some showing that they're delaying
21 for some reason, I mean, they shouldn't delay in doing that
22 because there's some consequences to delay.

23 But if there's -- if there's any reason that I
24 should revisit that because there's a problem here, you'll let
25 me know.

1 **MS. MCCLUNG:** Mm-hmm, yes, Your Honor.

2 **MAGISTRATE JUDGE PAYSON:** I'm certainly open to
3 reconsidering that if there's a reason to do that, but I would
4 expect that Mr. Frei-Pearson is going to move quickly to file
5 all those opt-in notices.

6 **MR. FRIE-PEARSON:** That's correct, Your Honor.

7 **MAGISTRATE JUDGE PAYSON:** Okay. You all need to
8 confer with respect to language in the notice, right?

9 **MS. MCCLUNG:** Mm-hmm.

10 **MAGISTRATE JUDGE PAYSON:** Okay.

11 **MS. MCCLUNG:** We have conferred. We would like to
12 submit -- we weren't able to agree on all of the issues, so we
13 would like to submit -- or I guess he's already submitted, I
14 would like to submit a proposed alternative notice.

15 **MAGISTRATE JUDGE PAYSON:** Okay. Confer on whatever
16 you have disputes about. Have you already done that?

17 **MS. MCCLUNG:** Mm-hmm.

18 **MAGISTRATE JUDGE PAYSON:** Okay, so there's nothing
19 else that you need to talk about?

20 **MR. FRIE-PEARSON:** I believe that's correct. I
21 believe -- are you solid on all the positions from this
22 afternoon?

23 **MS. MCCLUNG:** Correct, yeah.

24 **MAGISTRATE JUDGE PAYSON:** I mean, if there's
25 anything from my ruling today that makes you think you ought

1 to take another look at it, please do that.

2 And then sure, go ahead and submit to me your
3 position. And I would ask you to make it as easy as you can
4 for me to identify, you know, it's this language where the
5 plaintiff wants this and I want this and here's the reason
6 rather than trying to just read them side-by-side and see
7 what's --

8 **MS. MCCLUNG:** Would a red line be helpful?

9 **MAGISTRATE JUDGE PAYSON:** Yeah, red line would be
10 helpful.

11 **MS. MCCLUNG:** Plaintiff's counsel provided me with a
12 Word version so I can just --

13 **MAGISTRATE JUDGE PAYSON:** Yeah, that's helpful
14 rather than sometimes I just have to look at them and try to
15 figure out what the differences are. So if you can show me
16 what the differences are, I'd appreciate that.

17 And what were you thinking timewise?

18 **MS. MCCLUNG:** I could do it within a week.

19 **MAGISTRATE JUDGE PAYSON:** Okay, a week is fine.
20 Anything else we haven't talked about today?

21 **MS. MCCLUNG:** No, Your Honor.

22 **MAGISTRATE JUDGE PAYSON:** Okay.

23 **MR. FRIE-PEARSON:** During that one-week period, to
24 the extent that it delays the notice, plaintiffs would
25 respectfully ask for tolling.

1 **MAGISTRATE JUDGE PAYSON:** Okay. You certainly can
2 make that argument to the District Court down the road, but I
3 mean, you've got the record that I have made the decision
4 today that I directed you to confer.

5 I understand you have conferred and I think a week
6 is a reasonable period of time. You know, you may have some
7 other tolling arguments down the road so, you know, that's
8 something I think the District Court will determine.

9 **MR. FRIE-PEARSON:** The concern being that
10 potentially there's some --

11 **THE CLERK:** Sir, I need you to speak into a mic.

12 **MR. FRIE-PEARSON:** Sure, I apologize. The concern
13 being that there's someone who had their last day of work
14 during the time period that's going to expire such that they
15 don't get notice during this week, so I just wanted to flag
16 that for Your Honor.

17 **MAGISTRATE JUDGE PAYSON:** Okay, that makes sense to
18 me.

19 **MR. FRIE-PEARSON:** Okay.

20 **MAGISTRATE JUDGE PAYSON:** Anything else?

21 **MS. MCCLUNG:** No, Your Honor. Thank you.

22 **MAGISTRATE JUDGE PAYSON:** Okay, all right. Thank you
23 very much. Have a nice day.

24 **MR. FRIE-PEARSON:** Thank you, Your Honor.

25 **(WHEREUPON, the proceedings adjourned at 2:59 p.m.)**

* * *

CERTIFICATE OF TRANSCRIBER

In accordance with 28, U.S.C., 753(b), I certify that this is a true and correct record of proceedings from the official electronic sound recording of the proceedings in the United States District Court for the Western District of New York before the Honorable Marian W. Payson on June 14th, 2017.

S/ Christi A. Macri

Christi A. Macri, FAPR-CRR
Official Court Reporter